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Wednesday, December 07, 2005

What three constitutional amendments would you like to see?

What are the top three amendments you would like to see to the United States Constitution? James Buchanan proposes three. I think something quite like the latter two are already implied by broad clauses in our Constitution, but in the coming era of "conservative" Footnote Four justices, it would be good to reify them as specific textual amendments. Here's my take on Buchanan's three proposed amendments:

1. Fiscal responsibility -- requires a super-majority vote by the Congress to run a federal budget deficit. This is a good idea, but since it would provide political cover for Congress to raise taxes, I'd add a requirement of a super-majority to raise taxes, which can be found in some state constitutions.

2. Non-discriminatory politics -- Based on Hayek's proposed amendment -- “Congress shall make no law authorizing government to take any discriminatory measures of coercion.” Actually, this is the original meaning of both the General Welfare and Equal Protection Clauses, but it would be nice to add more specificity so that our courts would actually enforce them. I think the biggest issue here is that the Equal Protection Clause is currently treated as applying various levels of scrutiny to a handful of "suspect" (race) "intermediate" (gender), and "rationality with teeth" (age, sexual orientation, etc.) classifications. What should happen is that *any* classification made in any law, from "violent felons" to "infants", whether it be "employees" or "employers", ought to be examined under at least the *Lawrence* "rationality with teeth" standard. In other words, every law ought to be independently reviewable by the courts with respect to any of the distinctions it makes between different types of people, as to whether those distinctions are rationally related to a legitimate government purpose.

3. I'm not clear on what Buchanan's third proposal is, but I'm guessing it's encapsulated by "the natural liberty to enter into and exit from agreements." During the era between the *Allgeyer* and *Nebbia* cases (1897-1934) the United States Supreme Court recognized a right along these lines, sometimes called "freedom of contract." Modern cases from *Griswold* to *Lawrence* have established rights in more intimate relationships. As I suggested in my previous post, I'm greatly in favor of freedomm of contract in principle, but it's difficult to specify what it would involve in practice. There are detailed common law precedents and statutes (the Uniform Commercical Code as enacted in the states) governing contract law. Under these precedents and statutes contracts are often found to be unenforceable, as has always been the case at common law. I propose instead the following amendment: "No right of contract or property shall be infringed with the purpose or effect of unduly burdening choice in intimate relationships or medical services, or the control of parent over child." It still needs work, and we might like to add to or subtract from the list of protected categories, but I think it's a big improvement over the vague "freedom of contract." This kind of protection is already implied (IMHO) by substantive due process cases from *Allgeyer* and *Pierce v. Society of Sisters* to *Griswold* and *Casey*. However, with justices hostile to this libertarian

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tradition, we may soon have an urgent need to reify these rights in the form of specific constitutional amendments.

Posted by Nick Szabo at 1:13 PM

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